(H-113)

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-318

CARMEN SHANG, as Acting Commissioner of the New York State Department of Social Services,

Petitioner,

vs.

GAYLE McQUOID HOLLEY, individually and on behalf of JAMES McQUOID, NORMAN McQUOID, THOMAS McQUOID, DOUGLAS McQUOID, MICHAEL McQUOID, and ADELAINE McQUOID, her minor children,

Respondents,

and

JAMES REED, as Commissioner of the Monroe County Department of Social Services,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Shang[1], in this cause in which an illegal alien seeks a grant of Aid to Families With Dependent Children

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[1] The action had been commenced against Abe Lavine, then State Commissioner of Social Services. He has been succeeded in office and function by Philip Toia and now by Carmen Shang, Acting Commissioner (Rule 48 [43]).

(AFDC), prays that a *writ of certiorari* be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on April 27, 1977, which reversed the order of the United States District Court for the Western District of New York, entered November 22, 1976, and remanded the cause to that Court for the issuance of an appropriate injunction and for consideration of the issues of damages and attorney's fees.

Opinions Below

The decision and order of the District Court (HAROLD P. BURKE, D.J.) dated November 18, 1976 which granted summary judgment in favor of the State Commissioner is not reported. It is set forth as Appendix "A".

The opinion for reversal of the Court of Appeals was handed down April 27, 1977 and is reported at 553 F.2d 845. It is set forth as Appendix "B".

Jurisdiction

Judgment in the Court of Appeals was entered on April 27, 1977 (Appendix "C"). A Petition for Rehearing was timely filed on behalf of the State Commissioner. Rehearing was denied by order of the Court of Appeals dated June 3, 1977 (Appendix "D").[2]

The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by *writ of certiorari* is 28 U.S.C. § 1254(1).

[2] The mandate of the Court of Appeals has not been stayed.

Question Presented

Is respondent Holley (hereinafter plaintiff Holley) an alien who is "permanently residing in the United States under color of law" within the provisions of 45 C.F.R. § 233.50? The Court below has held that she is.

Regulation of the Federal Secretary of Health, Education and Welfare Involved

45 C.F.R. § 233.50

"§ 233.50 Citizenship and alienage.

Conditions for plan approval. A State plan under title I, IV-A, X, XIV, or XVI of the Social Security Act shall include an otherwise eligible individual who is a resident of the United States but only if he is either (a) a citizen or (b) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 203 (a) (7)[3] or section 212 (d) (5)[4] of the Immigration and Nationality Act). [38 FR 30259, Nov. 2, 1973]"

Statement of the Case

This case has been here before when *certiorari* was sought to review the judgment of the Court of Appeals (529 F.2d 1294) holding that the complaint in this Civil Rights action (42 U.S.C. § 1983) satisfied the jurisdictional requirement of substantiality of the constitutional claim presented. This Court

[3] 8 U.S.C. § 1153 (a) (7) [conditional entry] and

[4] 8 U.S.C. § 1182 (d) (5) [parole] respectively.

denied *certiorari sub nom. Toia* v. *Holley*, (426 U.S. 954 [1976]). Thereupon the State and County Commissioners filed their answers. Cross motions for summary judgment followed.

In this action plaintiff Holley, an alien who has been found by the United States Department of Justice, Immigration and Naturalization Service (hereinafter "INS"), to be illegally in the United States, seeks to obtain a grant of public assistance in the category of Aid to Families with Dependent Children. Her six minor citizen children, on behalf of whom she also sues, presently receive AFDC. The State Commissioner of Social Services, by Decision After an Administrative Fair Hearing, affirmed the action of the County Commissioner in removing plaintiff Holley from the family budget on the ground that she is an alien who is unlawfully residing in the United States and is not eligible for public assistance (New York Social Services Law, § 131-k).

The INS had stated[5] that plaintiff Holley "is illegally in the United States" and that "this service does not contemplate enforcing her departure from the United States at this time. Should the dependency of the children change, her case would be reviewed for possible action consistent with the circumstances then existing".

The Complaint

The complaint alleges that plaintiff Holley is a citizen of Canada who has been a resident of the United States since

[5] In a letter dated October 16, 1974 from Glenn A. Bertness, INS District Director, to Lawrence F. Tranello, Chief Legal Counsel, County of Monroe Department of Social Services, attached to the complaint. It is reproduced as Appendix "E".

1954, presently residing in Monroe County, New York, and that her six minor children, plaintiffs on behalf of whom she also sues, are aged 14, 13, 12, 11, 9 and 1, and are citizens of the United States by birth; that the United States Immigration and Naturalization Service has classified plaintiff Holley "as a deportable alien" but has determined "not to deport her, for humanitarian reasons, so long as her citizen children remain dependent upon her"; that application to the Immigration and Naturalization Service for status as an immigrant alien was denied because, as a person receiving public assistance, she is ineligible for immigrant status; and that since 1968, plaintiff Holley has been the recipient of AFDC on behalf of her children. The complaint further alleges the enactment of New York Social Services Law § 131-k, effective June 7, 1974; the promulgation of Departmental Regulation 18 NYCRR § 349.3[6]; action on the part of the County Commissioner on August 20, 1974 to reduce the public assistance grant for the seven plaintiffs by the amount allocated to meet the needs of plaintiff Holley because her "alien status made her ineligible for public assistance", resulting in a loss of $50.33 per month to the "McQuoid family household"; the request for a departmental administrative fair hearing and the affirmance of the County Commissioner's action by the State Commissioner; and the marriage of plaintiff Holley on February 25, 1975 to Wayne Holley, recipient of a "separate public assistance grant" for which eligibility is based on disability.

[6] The State Regulation, 18 Official Compilation Codes, Rules and Regulations of the State of New York [NYCRR] § 349.3, is virtually identical to the statute.

The complaint alleges four causes of action:

First: That New York Social Services Law § 131-k,[7] as enacted and applied, is invalid in that it is "inconsistent with, and operates to defeat the purposes of, the Social Security Act". Here plaintiffs rely on 42 U.S.C. §§ 601, 602 (a) (10) and 606 (b) (1);

Second: That section 131-k, as enacted and applied, is invalid in that it is inconsistent with Federal regulatory authority (45 C.F.R. § 233.50) in that plaintiff Holley "is permanently residing in the United States under color of law" within the provisions of such regulation;

Third: The third cause of action alleges plaintiffs' constitutional claim; and

Fourth: That plaintiffs are being denied rights secured by the Civil Rights Act of 1871 (42 U.S.C. § 1983).

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[7] Section 131-k, as amended by Laws 1977, Chapter 77 provides that:

> "§ 131-k. Illegal aliens. 1. Any inconsistent provisions of this chapter or other law notwithstanding, an alien who is unlawfully residing in the United States or who fails to furnish evidence that he is lawfully residing in the United States shall not be eligible for aid to dependent children, home relief or medical assistance.
>
> "2. An otherwise eligible applicant or recipient who has been determined to be ineligible for aid to dependent children, home relief or medical assistance because he is an alien unlawfully residing in the United States or because he failed to furnish evidence that he is lawfully residing in the United States shall be immediately referred to the United States immigration and naturalization service, or the nearest consulate of the country of the applicant or the recipient for such service or consulate to take appropriate action or furnish assistance".

The 1977 amendments have no bearing upon the case at bar.

The State Commissioner's Answer

In the belief that the only material fact here involved is that respondent Holley is an illegal alien and has been found to be so by the INS by its letter of October 16, 1974 (Appendix E), we stated below that "[t]he State Commissioner's Answer does not deny the material factual allegations of the complaint". (Brief in Court of Appeals, p. 8).

Respondents' Motion For Summary Judgment

Plaintiffs moved for summary judgment as to the pendent claims (first and second causes of action) as well as to their fourth cause of action (alleged deprivation of rights under Constitution and laws of the United States). In the alternative, they requested an order convening a three-judge District Court as to their third cause of action (constitutional claim).

State Commissioner's Cross Motion For Summary Judgment

The State Commissioner cross moved for summary judgment as to the entire complaint[8].

The affidavit of Eleanor A. Sochocki, a Principal Social Services Program Specialist, Division of Income Maintenance, New York State Department of Social Services, was filed in support of the State Commissioner's cross motion for summary judgment, and in opposition to plaintiffs' motion. We there demonstrated *inter alia* that the State statute and the State regulation were a response to regulations of the Secretary of Health, Education and Welfare, relating to citizenship and alienage, as to AFDC (45 C.F.R. § 233.50) and

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[8] The County Commissioner also sought summary judgment.

Medicaid (45 C.F.R. § 248.50), which became effective January 2, 1974, and showed that the State regulation, as it then read (it is being amended to conform to 1977 amendments to New York Social Services Law, § 131-k), had been approved by the HEW regional office.

Decision and Order at the District Court
(Unreported)

Judge BURKE held:

> "Plaintiffs' motion for summary judgment and for a three judge court is in all respects denied.
>
> "Summary judgment is granted in favor of the defendant State Commissioner of Social Services against the plaintiffs declaring that New York Social Services Law Section 131-k and departmental regulation 18 NYCRR, Section 349.3, as enacted and applied, do not conflict with the provisions of 45 C.F.R. Section 233.50 but are in conformity thereto; that the statute and the regulation as enacted and applied do not conflict with the Social Services [sic] Act but are in conformity thereto; that plaintiffs have not been deprived of rights secured by the laws of the United States; that plaintiff Gayle McQuoid Holley is not permanently residing in the United States under color of law."

Opinion of the Court of Appeals

In reversing, the Court of Appeals ruled only as to respondents second cause of action and found that respondent Holley "is permanently residing in the United States under color of law" within 45 C.F.R. § 233.50. The Court relied upon the letter of October 16, 1974 from Glenn A. Bertness, INS District Director, to Lawrence F. Tranello, Chief Legal Counsel for the Monroe County Department of Social Services. (Appendix E) (1) as an "official assurance" that plaintiff Holley was in the country under color of law and (2) in holding that she was permanently here, at least until her children were grown to full age.

Reasons For Granting the Writ

A

We urge that the Court below has decided a novel and important question of Federal law which has not been, but should be, settled by this Court. This is so because the "otherwise permanently residing in the United States under color of law" provisions of 45 C.F.R. § 233.50 (relating to AFDC) appear elsewhere in Federal law, in regulations as well as in statutes which are virtually identical to the regulation at issue in the case at bar.

45 C.F.R. § 248.50 pertains to eligibility for Medicaid (Title XIX of the Social Security Act). 7 C.F.R. § 271.1 (e), a regulation of the Secretary of Agriculture pertains to eligibility for Food Stamps (7 U.S.C. § 2011 *et seq.*).

It is believed that it was the Congress that first used the phrase in defining eligibility for the Federal program of Supplemental Security Income for the Aged, Blind and Disabled (SSI) as enacted by Public Law 92-603. 42 U.S.C. § 1382-c (a) (1) (B), as effective January 1, 1974, provides:

> "(a) (1) For purposes of this subchapter, the term 'aged, blind, or disabled individual' means an individual who—
>
> • • •
>
> "(B) is a resident of the United States, and is either (i) a citizen or (ii) an alien lawfully admitted for permanent residence or otherwise permanently residing in the

United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 1153 (a) (7) or section 1182 (d) (5) of Title 8)." (Social Security Act, § 1614 (a) (1) (B), 86 Stat. 1471.)[9]

More recently the Congress, as to unemployment compensation, has provided (26 U.S.C. § 3304 [a] [14] [A]):

"§ 3304. Approval of State laws

"(a) Requirements.—The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that—

• • •

"(14) (A) compensation shall not be payable on the basis of services performed by an alien unless such alien is an individual who has been lawfully admitted for permanent residence or otherwise is permanently residing in

[9] When 45 C.F.R. §§ 233.50 and 248.50 were promulgated (38 *Federal Register*, p. 30259, November 2, 1973), the preamble stated:

> "Requiring inclusion of illegal aliens, *or leaving the matter to State option would be inconsistent with title III of Pub. L. 92-603*, which establishes a Federal program of Supplemental Security Income for the Aged, Blind, and Disabled (SSI) that excludes aliens not lawfully residing in this country. Accordingly, the regulations as proposed on June 27, 1973, are hereby adopted." (Emphasis supplied.)

The June 27, 1973 proposal (38 *Federal Register*, p. 16911) shows that comments were received from 59 persons, 50 of whom were opposed to granting of assistance to aliens who have not been lawfully admitted to this country; that the comments were based primarily on (1) the belief that this Court's decision in *Graham* v. *Richardson* (403 U.S. 365 [1971]) and the equal protection clause of the Constitution are not applicable to aliens not lawfully admitted to the United States; (2) the fear that granting such assistance would raise case loads beyond a State's fiscal capabilities or require a corresponding reduction of assistance to citizens and lawfully admitted aliens, and (3) the belief that assistance to such aliens, if provided at all, should be fully financed from Federal funds, since the Federal Government has responsibility for immigration and naturalization.

the United States under color of law (including an alien who is lawfully present in the United States as a result of the application of the provisions of section 203 (a) (7) or section 212 (d) (5) of the Immigration and Nationality Act), (90 STAT. 2680)"[10].

Thus, at least three Federal Departments (Labor, Agriculture and Health, Education and Welfare) are charged with administering programs involving aliens and they must meet the issue of whether those aliens are permanently residing in the United States under color of law.

Since the phrase apparently originated in the Congress, we urge that Congressional intent is the surest guide for those charged with administering statutes and regulations which contain the provision.

We urge that the words employed in the SSI and unemployment compensation statutes, in 45 C.F.R. § 233.50 and elsewhere, are words of art and originated with the Senate Finance Committee (in relation to its deliberations concerning H.R.—1 of 1972, Public Law 92-603) as a proposed Amendment to the AFDC provisions of the Social Security Act. The Report of the Senate Finance Committee (Senate Report No. 92-1230, Serial Set No. *12973-4*) relating to "Eligibility of Aliens for Welfare; Persons outside the United States" states in pertinent part (p. 466):

> "***States would be mandated in Federal law to require as a condition of eligibility for the AFDC welfare program under the Social Security Act *** that an individual be a resident of the United States and either a citizen or alien lawfully admitted for permanent residence *or a person who is a permanent resident*

[10] These provisions are to be effective in some states in 1978 and in others in 1979. See Public Law 94-566, § 314 (b) (90 Stat. 2680).

under color of law (that is, a person who entered the United States before July 1948 and who may be eligible for admission for permanent residence at the discretion of the Attorney General under section 1259 of title 8 of the United States Code)." (Emphasis supplied.)

While the proposed AFDC provisions were not passed, the proposal was enacted as to the SSI program (42 U.S.C. § 1382 (c) (a) (1) (B), *supra*)[11]. The enrollment of H.R.—1 was corrected to include the phrase "(including any alien who is lawfully present in the United States as a result of the application of the provisions of section 203 (a) (7) or section 212 (d) (5) of the Immigration and Nationality Act)" which was apparently added in the Senate-House Conference. (See H. Con. Res. 724 of 1972, 118 Congressional Record, October 17, 1972, pp. 36820 and 36937.)

That the need for this Court to definitively construe the phrase is real is demonstrated by a regulation of the Secretary of Health, Education and Welfare, issued through the Social Security Administration as to SSI. SSI regulations implementing 20 C.F.R. § 416.202 (b) (2), the SSI regulation which is comparable to 45 C.F.R. § 233.50, provide (20 C.F.R. § 416.204):

"§ 416.204 Evidence of permanent residence in the United States under color of law.

"(a) *Type of evidence to be submitted.* Evidence that an applicant has been residing permanently under color of law in the United States, as defined in § 416.120 for the purposes of establishing eligibility for supplemental security income payments, shall be of the following character:

[11] 8 U.S.C. § 1259 is entitled "*Record of Admission for permanent Residence* in the case of Certain Aliens Who Entered the United States prior to June 30, 1948" (Emphasis supplied).

(1) INS Form I-94 (Arrival Departure Record) endorsed 'REFUGEE—CONDITIONAL ENTRY,' or

(2) INS Form I-94 endorsed to show bearer has been paroled for an indefinite period pursuant to section 212 (d) (5) of the Immigration and Nationality Act, or

(3) Documentation in the form of correspondence from the Immigration and Naturalization Service stating the applicant has been granted *indefinite voluntary departure* or an *indefinite stay of deportation*.

(b) *Evidence not available.* If the evidence described in paragraph (a) of this section is not available, the applicant shall state the reason therefor and submit other evidence of probative value."[12]

We have been unable to find any such regulation pertaining to AFDC. There is, as far as is known, however, no reason to believe that the Secretary of Health, Education and Welfare has adopted a different view as to AFDC. This Court should settle the matter.

B

The Court below did not discuss the administrative and legislative background which we have set out here and which was, for the most part, contained in our brief below[13]. Rather the Court embarked upon an independent course of judicial construction, the major premise of which is that plaintiff

[12] In the case at bar, it appears that there is no stay of deportation but that the INS has merely concluded that "immediate deportation is not practicable or proper" (8 U.S.C. § 1227 [a]). See Exhibit E annexed hereto, Bertness letter of October 16, 1974. Stays of deportation are covered by 8 U.S.C. § 1227 (d) which has no application here.

[13] The Court below stated that "[w]e are not supplied with the administrative or legislative background, if any existed, of the quoted regulation [45 C.F.R. § 233.50]" (Slip Opinion, p. 3222). One ground for the Petition for Rehearing was that we had supplied such background material in our brief.

Holley had an "official assurance" from the INS that she could remain in this country. The Court, we urge, erred.[14]

The INS letter (Appendix E) was addressed to Mr. Lawrence F. Tranello, Chief Legal Counsel of the Monroe County Department of Social Services, not to plaintiff Holley.[15]

The record does not disclose that plaintiff Holley has *personally* any "official assurance" (Slip Opinion, p. 3223) that she will not be deported. The letter of October 16, 1974 presumably would not have been written if Mr. Tranello had not made an inquiry.

Instead of looking to legislative history, or perhaps to the HEW regulation as to SSI (20 C.F.R. § 416.204; *supra*), for guidance in establishing what "permanency" is, the Court below relied upon 8 U.S.C. § 1101 (a) (31)[16] and eschewed the

[14] We so urged on the Petition for Rehearing.

[15] It states:

"The records of this Service indicate Mrs. McQuoid, formerly Miss Dianne Gayle Rivers, was born in Smith Falls, Ontario, Canada, on August 22, 1942. She first entered the United States as a nonimmigrant student on June 30, 1958. Her last entry was apparently on January 2, 1969, at which time she falsely claimed to be a returning lawful permanent resident of the United States."

Thus the Court below erred in adopting the facts alleged in paragraph 8 of the complaint, and denied by the State Commissioner, as showing that plaintiff Holley entered the United States lawfully in 1954 and has resided here continuously since 1954 except for three months in 1958 (Slip Opinion, page 3219).

[16] 8 U.S.C. § 1101 (a) (31), provides:

"§ 1101. Definitions

(a) As used in this chapter—

• • •

(31) The term 'permanent' means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law."

plain meaning of 8 U.S.C. § 1259 to establish "color of law". The Court apparently relied upon such discretion as the INS might exercise in the premises. We urge that the INS letter of October 16, 1974 did not give plaintiff Holley *any* status whatsoever. Clearly she "is illegally in the United States" and she remains here only because INS has determined that "immediate deportation is not practicable or proper" (8 U.S.C. § 1227[a]). She is not here *permanently* nor is she here *under color of law.* She is here illegally and is not entitled to AFDC under the Federal regulation.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Dated: August 19, 1977

Respectfully submitted,

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APPENDIX A

Decision and Order of the District Court

Entered in the Office of the Clerk of the United States District Court for the Western District of New York, November 22, 1976

UNITED STATES DISTRICT COURT

Western District of New York

GAYLE MCQUOID HOLLEY, individually and on behalf of JAMES MCQUOID, NORMAN MCQUOID, THOMAS MCQUOID, DOUGLAS MCQUOID, MICHAEL MCQUOID, and ADELAINE MCQUOID, her minor children,

Plaintiffs,

vs.

ABE LAVINE, as Commissioner of the New York State Department of Social Services, and JAMES REED, as Commissioner of the Monroe County Department of Social Services,

Defendants.

Civil 75-151

K. Wade Eaton, 80 West Main Street, Rochester, N.Y. 14614, Attorney for plaintiffs.

Louis J. Lefkowitz, Attorney General of New York, The Capitol, Albany, N.Y. 12224, Attorney for defendant State Commissioner of Social Services, (Jean M. Coon, Assistant

Solicitor General and Alan W. Rubenstein, Principal Attorney, of counsel).

Charles G. Finch, 111 Westfall Road, Rochester, N.Y. 14620, Attorney for defendant Reed as Commissioner of The Monroe County Department of Social Services (Charles G. Porreca, of counsel).

By notice of motion with supporting papers filed July 2, 1976 plaintiffs move for summary judgment on the first, second and fourth causes of action, and in the alternative, for the convening of a three judge court to hear and determine plaintiffs' motion for summary judgment.

By notice of motion with supporting papers filed July 9, 1976 the defendant State Commissioner of Social Services moves for summary judgment upon grounds set forth in the notice of motion and particularly designated as paragraphs A, B, C, and D. By notice of motion with supporting papers filed July 9, 1976 the defendant Reed as Commissioner of the Monroe County Department of Social Services moves for summary judgment upon grounds particularly set forth in the notice of motion. The motions have been submitted upon written memoranda.

Plaintiffs' motion for summary judgment and for a three judge court is in all respects denied.

Summary judgment is granted in favor of the defendant State Commissioner of Social Services against the plaintiffs declaring that New York Social Services Law Section 131-k and departmental regulation 18 NYCRR, Section 349.3, as enacted and applied, do not conflict with the provisions of 45 C.F.R. Section 233.50 but are in conformity thereto; that the statute and the regulation as enacted and applied do not con-

flict with the Social Services Act but are in conformity thereto; that plaintiffs have not been deprived of rights secured by the laws of the United States; that plaintiff Gayle McQuoid Holley is not permanently residing in the United States under color of law.

ALL OF THE ABOVE IS SO ORDERED and ADJUDGED.

HAROLD P. BURKE,
Harold P. Burke,
United States District Judge.

November 18, 1976.

APPENDIX B

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
For The Second Circuit

No. 731—September Term, 1976.
(Argued April 6, 1977 Decided April 27, 1977.)
Docket No. 76-7588

GAYLE McQUOID HOLLEY, individually and on behalf of JAMES McQUOID, NORMAN McQUOID, THOMAS McQUOID, DOUGLAS McQUOID, MICHAEL McQUOID, and ADELAINE McQUOID, her minor children,

Plaintiff-Appellant,

v.

ABE LAVINE, as Commissioner of the New York State Department of Social Services, and JAMES REED, as Commissioner of the Monroe County Department of Social Services,

Defendants-Appellees.

Before:

OAKES, *Circuit Judge*, HOLDEN, *District Judge*,* and WYZANSKI, *Senior District Judge*.**

Appeal from order of the United States District Court for the Western District of New York, Harold P. Burke, *Judge*, granting summary judgment to defendants on

* Chief Judge for the District of Vermont, sitting by designation.
** Senior District Judge for the District of Massachusetts, sitting by designation.

ground that New York Socia' Services Law § 131-k-1 is not repugnant to federal Social Security Act and regulations thereunder.

K. WADE EATON, Rochester, New York (Greater Up-State Law Project), *for Appellants.*

LOUIS J. LEFKOWITZ, Attorney General of the State of New York, *Attorney for Appellee State Commissioner of Social Services, Albany, New York.*

JEAN M. COON, Assistant Solicitor General, ALAN W. RUBENSTEIN, Principal Attorney, for Lavine, and CHARLES G. FINCH, Chief Counsel, CHARLES G. PORRECA, of Counsel, Monroe County Department of Social Services, Rochester, New York, *for Reed, for Appellees.*

WYZANSKI, *Senior District Judge*:

This is an appeal from a judgment entered by Judge Harold P. Burke in the United States District Court for the Western District of New York. Plaintiff is an alien unlawfully residing in the United States but covered by an official communication from the Immigration and Naturalization Service stating that it "does not contemplate enforcing her departure from the United States at this time." Defendants administer New York Social Services Law § 131-k-1 and New York State Department of Social Services regulation 18 N.Y.C.R.R. § 349.3(a), both of which provide that "an alien who is *unlawfully residing* in the United States" shall not be "eligible for aid to dependent children".

Pursuant to those New York state regulations defendants cut off payments of Aid for Dependent Children (AFDC) benefits to plaintiff.

The question presented is whether such application of New York state law is repugnant to provisions of the national Social Security Act incorporated in 42 U.S.C. §§ 601, 602 (a) (10), and 606 (b) (1) and to the implementing regulation set forth in 45 C.F.R. § 233.50. The relevant part of the Social Security Act, 42 U.S.C. § 601 authorizes "payments to States which have submitted, and had approved by the Secretary [of H.E.W.], State plans for aid and services to needy families with children." The Secretary, by 45 C.F.R. § 233.50, has stipulated that the "State plan . . . shall include an otherwise eligible individual who is a resident of the United States but only if he is either (a) a citizen or (b) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provision of section 202 (a) (7) or section 212 (d) (5) of the Immigration and Nationality Act)."

The basic facts in this case were found by the New York authorities and are undisputed.

Plaintiff, then called Diane Gayle Rivers, was born in Smith Falls, Ontario, Canada on August 22, 1942. At birth she was, and ever since has been, a citizen of Canada. As a single girl aged twelve she entered the United States lawfully in 1954 as a temporary non-immigrant student, pursuant to an earlier version of 8 U.S.C. § 1101 (15) (F). Since 1954, except for three months in 1958, she has continuously resided in the United States. On September 6, 1959 in the United States she married Norman Stanley McQuoid. She then took the name

of Gayle McQuoid. Five children, who are still minors, were born in the United States of that marriage. By virtue of the Fourteenth

Amendment to the United States Constitution, they are American citizens. In August 1966 she and Stanley McQuoid separated. Later she had a sixth child born in the United States, and hence an American citizen.

Initially the New York State Department of Social Services through the Monroe County Department of Social Services paid to plaintiff on account of herself and each of her six children a separately calculated sum on account of the Aid to Families with Dependent Children (AFDC) program cooperatively operated by the State of New York and the federal Department of H. E. W. After the State of New York in 1974 enacted § 131-k-1 of its Social Services Law, which provided that every alien "unlawfully residing in the United States . . . is not eligible for aid to dependent children", the Commissioner of the State Department for Social Services and the Commissioner of the Monroe County Department for Social Services, on behalf of the State of New York, ceased to pay to the plaintiff anything on her own account as parent, but did continue to pay to the plaintiff AFDC benefits for her six children.

Following appropriate application to the New York state authorities which was unsuccessful, plaintiff, on her own behalf and on behalf of her six children, filed a complaint in the District Court against the defendants, who are respective-

ly the Commissioner of the New York State Department of Social Services and the Commissioner of the Monroe County Department of Social Services, seeking equitable and monetary relief on account of the non-payment to her as a parent of any AFDC benefit. Judge Burke dismissed the complaint for lack of jurisdiction and failure to state a claim on which relief could be granted. This court reversed in a short per curiam opinion, *Holley* v. *Lavine*, 529 F.2d 1294 (2nd Cir.), *cert. denied*, 426 U.S. 954 (1976), in which the District Court on remand was directed to convene a three-judge court to consider appel-

lant's constitutional claims unless it found her statutory claims to be meritorious, *id.* at 1296. On remand both plaintiff and defendants ultimately moved for summary judgment. The District Court entered judgment for defendants. In the District Court Judge's opinion the state statute, § 131-k-1 of the New York Social Services Law, as applied to cut off the plaintiff's individual AFDC benefits as parent was not repugnant to the national Social Security Act. The District Judge denied the motion to convene a three-judge court. Plaintiff appealed to this court.

We start with the obvious point that the elimination of payments to plaintiff for herself was plainly authorized by the text of the state law. But the first question for us is whether that law is in conflict with the plan approved by the Secretary of H.E.W. pursuant to 45 C.F.R. § 233.50, implementing 42 U.S.C. § 601.

It is not contested that the federal law, so far as it is applicable, governs the payment of AFDC benefits, as a consequence of the Supremacy Clause, Article VI of the United States Constitution. *King* v. *Smith*, 392 U.S. 309 (1968).

What are contested are the conditions upon which the Secretary of H.E.W. gave his approval to the New York State plan. More specifically the question relates to the meaning of "permanently residing in the United States under color of law", a phrase appearing in 45 C.F.R. § 233.50, which provides that:

> ". . . A state plan . . . shall include an otherwise eligible individual who is a resident of the United States but only if he is either (a) a citizen or (b) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of

> the provisions of Section 203 (a) (7) or Section 212 (d) (5) of the Immigration and Nationality Act.)"

We are not supplied with the administrative or legislative background, if any existed, of the quoted regulation. Nor, despite our proposal, has the Department of H.E.W. chosen to help us. Pursuant to this Court's suggestion when this case was here before, *Holley* v. *Lavine*, *supra*, plaintiff's counsel requested the views of the Department of H.E.W. The Department replied that it would require a request from the

District Court for the Department's appearance as an *amicus curiae*. April 7, 1976 plaintiff asked the District Court to invite H.E.W. to appear. But the District Judge did not respond.

In the absence of other background material, defendants, speaking for their State government, argued that the New York statute and the federal regulation reflect a problem of horrendous proportions. We are asked to take judicial notice that millions of persons are unlawfully in the United States. Their presence is said to be the cause of major financial burdens to the states and the nation because these illegal aliens claim unearned benefits from welfare systems. It is argued that the states to protect their solvency have the right to drop from the welfare rolls those who, because their residence is in violation of law, are subject to deportation.

The picture presented in such vivid colors hardly represents this particular case.

We are *not* dealing with a person who is residing in the United States without the knowledge or permission of the Immigration and Naturalization Service. She fully disclosed her situation to the Department of Justice which found that plaintiff, having been admitted lawfully as a student, married in this country a husband;

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they had five children born here as American citizens; plaintiff then separated from her husband, and later had a sixth child who is also an American citizen by birth; all six children are minors living with their mother; and all six are now entitled to receive and are receiving AFDC payments.

Having this information, a responsible official of the Immigration and Naturalization Service—the officer authorized by the Department of Justice to initiate in the District of Buffalo, where plaintiff is living, any appropriate deportation proceeding—by formal letter, mentioned earlier in this opinion, notified a responsible official of the New York State Department of Social Services that "deportation proceedings have not been instituted . . . for humanitarian reasons" and the "Service does not contemplate enforcing her departure from the United States at this time."

Far from being in a class with millions of aliens unlawfully residing in the United States, plaintiff is in what is almost certainly a minuscule sub-class of aliens who, although unlawfully residing in the United States, are each individually covered by a letter from the Department of Justice stating that the Immigration and Naturalization Service "does not contemplate enforcing . . . [the alien's] . . . departure from the United States at this time."

This case is thus narrowed to the precise question whether, in the unusual situation where an alien parent has an official assurance that the parent will not be deported at least until the children are no longer dependent on that parent, such parent is "permanently residing in the United States under color of law."

We first answer so much of the question as calls for a construction of the phrase "under color of law" as used in this regulation. The phrase obviously includes actions

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not covered by specific authorizations of law. It embraces not only situations within the body of the law, but also others en-

folded by a colorable imitation. "Under color of law" means that which an official does by virtue of power, as well as what he does by virtue of right. The phrase encircles the law, its shadows, and its penumbra. When an administrative agency or a legislative body uses the phrase "under color of law" it deliberately sanctions the inclusion of cases that are, in strict terms, outside the law but are near the border.

There is no more common instance of action "under color of law" than the determination of an official charged with enforcement of the law that he, as a matter of public policy, will exercise his discretion not to enforce the letter of a statute or regulation because such enforcement would involve consequences, or inflict suffering, beyond what the authors of the law contemplated. The discretionary refusal of a prosecutor or like administrator of the law to use his enforcement powers is often not supported by specific language in a statute or other charter of authority. Yet there is a legion of adjudicated cases which recognize that the prosecutor or like enforcing official may exercise a discretionary power, virtually unreviewable by a court, *not* to enforce a statutory command, and *not* to seek the imposition of penalties or other sanctions upon a known violator. *Peek* v. *Mitchell*, 419 F. 2d 575 (6th Cir., 1970); *Newman* v. *United States*, 382 F. 2d 479 (D.C.C.A., 1967); *Nader* v. *Kleindienst*, 375 F.Supp. 1138 (D.C.D.C., 1973).

The case at bar is an obvious instance of an executive department, here INS, determining not to enforce one set of laws because to do so would defeat another avowed Congressional object, here that involved in enacting 42 U.S.C. § 606(b)(1). According to House Report No. 1300, cited in *Shirley* v. *Lavine*, 365 F. Supp. 818, 822 (N.D.N.Y.,

1973), *aff'd*, 420 U.S. § 730 (1975), the statute provides AFDC payments to the parent or other adult with whom a dependent child lives, on the ground that "in families with small children, it is necessary for the mother or the adult to be in the home full time to provide proper care and supervision". Congress sought to avoid suffering by innocent American minor children, and perhaps sought to prevent the public treasury from incurring greater expense for foster care than it now incurs for parental care. In short, "under color of law", those charged with the power to deport have allowed plaintiff, as a parent of American citizens, to remain a resident.

But it is argued that the parent is not "permanently residing" in the United States, inasmuch as the parent's status is dependent upon a letter which explicity states that "the Service does not contemplate enforcing her departure from the United States *at this time*. Should the dependency of the children change, her case would be reviewed for possible action consistent with circumstances then existing". (Emphasis added.)

In construing H.E.W. Regulation 45 C.F.R. § 233.50, we are mindful that the regulation is expressed in words of art carefully chosen. The regulation makes a distinction based on whether "an otherwise eligible individual . . . is . . . an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) or section 212(d)(5) of the Immigration and Nationality Act)".

In matters arising under, or cognate to, the Immigration and Nationality Act the phrase "permanently residing in the

United States under color of law" may properly be construed with an eye to 8 U.S.C. § 1101(a)(31) which

provides that in the immigration law "The term 'permanent' means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law". The statutory definition of the adjective "permanent" aids in the interpretation of the adverb "permanently".

Far more significant as aids to interpretation of 45 C.F.R. § 233.50 are the very parts of the Immigration and Nationality Act which the regulation itself gives an illustrative, that is, the provisions of section 203(a)(7) [8 U.S.C. § 1153(7)] and section 212(d)(5) [8 U.S.C. § 1182(d)(5)] of the Immigration and Nationality Act. Section 203(a)(7) permits a refugee to have only conditional entry pursuant to regulations of the Attorney General and section 212(d)(5) permits the Attorney General in his discretion to parole into the United States temporarily an otherwise inadmissible alien.

Those sections are themselves instances where the alien is permitted to stay in the United States not necessarily forever, but only so long as he is in a particular condition. Those statutory references furnish a suitable occasion to invoke the maxim *noscitur a sociis*. Such invocation is congenial to the general attitude displayed in the Social Security Act—for in 42 U.S.C. § 1301(b)—which admittedly governs interpretation

only of the statute itself and not of regulations thereunder—Congress provided that the word "includes" "shall not be deemed to exclude other things otherwise within the meaning of the term defined". This is a legislative caution to lean more on the *"ejusdem generis"* than on the *"inclusio unius, exclusio alterius"* canon of construction.

We therefore, reach the conclusion that as the Secretary of H.E.W. used the phrase "permanently residing in

the United States" in 45 C.F.R. § 223.50, the Secretary included such a person as plaintiff whose residence in this country was assured at least until all her children had grown to full age, and might be extended thereafter indefinitely dependent upon conditions then existing. We also note that extension is highly probable because this alien's ties are so close to six American citizens that no executive department is likely to require her to return to a land she left when she was a beginning student and before she was educated and married in the United States.

Our conclusion moots the issue as to whether § 131-k-1 of the New York Social Services Law, if applied to preclude the payment of AFDC benefits to an alien not permanently residing lawfully in the United States, would violate the Fourteenth Amendment to the United States Constitution. Hence there is no need to convoke a three judge District Court to consider the matter.

There remains to be considered by the District Court the appropriate form of injunction as well as issues of damages,

[cf. *Edelman* v. *Jordan*, 415 U.S. 651, 667, n. 12 (1974)] and attorney's fees both in the District Court and in this Court. [See Civil Rights Attorney's Fees Awards Act of 1976, P.L. 94-559; *Torres* v. *Sachs*, 538 F.2d 10 (2nd Cir., 1976).]

Since it appears the original judge might have difficulty in putting aside previously expressed views, and reassignment is advisable to avoid the appearance of prejudgment, the case will be remanded to the District Court for reassignment in keeping with the principles stated in *United States* v. *Robin*, No. 76-1033, slip op. 2591, 2593 (2nd Cir., March 30, 1977).

Reversed and remanded for the issuance of an appropriate injunction, and for consideration of issues of damages and attorney's fees both in the District Court and in this Court.

APPENDIX C

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of April one thousand nine hundred and seventy-seven.

United States Court of Appeals
Second Circuit
Filed Apr 27 1977
A. Daniel Fusaro, Clerk

Present: HON. JAMES L. OAKES, *Circuit Judge;* HON. JAMES S. HOLDEN, HON. CHARLES EDWARD WYZANSKI, JR., *District Judges.*

GAYLE McQUOID HOLLEY, individually and on behalf of JAMES McQUOID, NORMAN McQUOID, THOMAS McQUOID, DOUGLAS McQUOID, MICHAEL McQUOID & ADELAINE McQUOID, her minor children,

Plaintiffs-Appellants,

v.

ABE LAVINE, as Commissioner of the New York State Department of Social Services, & JAMES REED, as Commissioner of the Monroe County Department of Social Services,

Defendants-Appellees.

76-7588

Appendix C—Judgment of the Court of Appeals.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and the action be and it hereby is remanded to said District Court for the issuance of an appropriate injunction, and for consideration of issues of damages and attorney's fees both in this court and the district court in accordance with the opinion of this court with costs to be taxed against the appellees.

A. DANIEL FUSARO,
Clerk
By ARTHUR HELLER,
Arthur Heller,
Deputy Clerk.

APPENDIX D

Order of the Court of Appeals Denying Petition For Rehearing

UNITED STATES COURT OF APPEALS
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 3rd day of June, one thousand nine hundred and seventy-seven

United States Court of Appeals
Second Circuit
Filed Jun 3 1977
A. Daniel Fusaro, Clerk

Present: HON. JAMES L. OAKES, *Circuit Judge;* HON. JAMES S. HOLDEN, HON. CHARLES E. WYZANSKI, *District Judges.*

GAYLE McQUOID HOLLEY, individually and on behalf of JAMES McQUOID, NORMAN McQUOID, THOMAS McQUOID, DOUGLAS McQUOID, MICHAEL McQUOID & ADELAINE McQUOID, her minor children,

Plaintiffs-Appellants,

v.

ABE LAVINE, As Commissioner of the New York State Department of Social Services, and JAMES REED, As Commissioner of the Monroe County Department of Social Services,

Defendants-Appellees.

76-7588

Appendix D—Order of the Court of Appeals Denying Petition For Rehearing.

A petition for a rehearing having been filed herein by counsel for the defendant-appellee Abe Lavine,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

APPENDIX E

Letter Dated October 16, 1974 From Glenn A. Bertness, INS Director, to Lawrence F. Tranello

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
UNITED STATES COURT HOUSE
Buffalo, New York — 14202

Please Refer to this File Number
A10 370 151(DD)
Phone: 842-3603

October 16, 1974

Lawrence F. Tranello, LLB
Chief Legal Counsel
County of Monroe
Department of Social Services
111 Westfall Road
Rochester, N.Y. 14620

Dear Mr. Tranello:

Reference is made to your letter of September 18, 1974, concerning Gayle McQuoid, alien registration number A10 370 151.

The records of this Service indicate Mrs. McQuoid, formerly Miss Dianne Gayle Rivers, was born in Smith Falls, Ontario, Canada, on August 22, 1942. She first entered the United States as a nonimmigrant student on June 30, 1958. Her last entry was apparently on January 2, 1969, at which time she falsely claimed to be a returning lawful permanent resident of the United States.

Appendix E—Letter Dated October 16, 1974 From Glenn A. Bertness, INS Director, to Lawrence F. Tranello.

On September 6, 1959, she married Norman Stanley McQuoid. Five children, natives and citizens of the United States, were born of this marriage. She has allegedly been separated from Mr. McQuoid since August of 1966. It is my understanding that subsequently she gave birth to a sixth child, father not known.

Although Mrs. McQuoid is illegally in the United States, deportation proceedings have not been instituted against her for humanitarian reasons relating to her six United States citizen children. So long as she is receiving public assistance, she is ineligible for an immigrant visa, for which she might otherwise be eligible.

This Service does not contemplate enforcing her departure from the United States at this time. Should the dependency of the children change, her case would be reviewed for possible action consistent with circumstances then existing.

If I may be of further assistance, please advise.

Very truly yours,

GLENN A. BERTNESS,
Glenn A. Bertness,
District Director.

No. 77-318

In the Supreme Court of the United States

OCTOBER TERM, 1977

CARMEN SHANG, PETITIONER

v.

GAYLE MCQUOID HOLLEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-318

CARMEN SHANG, PETITIONER

v.

GAYLE McQUOID HOLLEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's invitation of October 17, 1977. The views expressed here have been formulated after consultation with the Department of Health, Education, and Welfare, whose program is directly involved, with the Departments of Labor and Agriculture, which now, or in the recent past, have administered programs governed by identical guidelines in respect of the inclusion of aliens, and with the Immigration and Naturalization Service.

1. The underlying facts are, for the most part, unchallenged. Although it is not altogether clear whether Mrs. Holley (as she now is) first entered the United States

in 1954 or 1958, or when she last re-entered,[1] there is no dispute that she has been within the country, with some absences, since some date in the 1950s and has continuously remained since at least 1969. It is also common ground that Mrs. Holley has six minor dependent children, all United States citizens, the youngest of whom was only one year old when these proceedings began in 1976. According to the Immigration and Naturalization Service, she is, strictly speaking, "illegally in the United States," but it has been determined that, for humanitarian reasons, no deportation proceedings or other measures to enforce Mrs. Holley's departure will be undertaken so long as her children remain dependent upon her.[2] Moreover, it is not settled what action might be taken when the children cease to be dependent. If she is not then herself receiving public assistance—which now debars her—she might be eligible for permanent resident status.

Apparently, Mrs. Holley has been receiving payments under the Aid for Dependent Children program in the State of New York since 1968. The entitlement of her children has never been questioned, but, in 1974, the State and County Social Services Commissioners challenged her own claim under New York regulatory provisions that deny eligibility to "an alien who is unlawfully residing in

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[1]According to her own complaint (Pet. 5), Mrs. Holley has been residing in the United States since 1954. The court of appeals accepted that representation, adding that she had absented herself since then only for three months in 1958 (Pet. App. A6). However, the INS Director's letter (Pet. App. A21) states that Mrs. Holley first entered the country in 1958, and last re-entered in 1969.

[2]Such action is authorized by Section 237(a) of the Immigration and Naturalization Act, 66 Stat. 201, 8 U.S.C. 1227(a), as implemented by regulation. See 8 C.F.R. 237.1

the United States." The payments to Mrs. Holley on account of the family unit were accordingly reduced, and after an unsuccessful administrative appeal, she filed a complaint in the district court. The suit was initially dismissed for lack of jurisdiction, and, on remand from the court of appeals, summary judgment was entered against Mrs. Holley. On the present appeal, the judgment was reversed, the court of appeals ruling that, under the governing federal regulation (45 C.F.R. 233.50), Mrs. Holley qualified as "an alien * * * permanently residing in the United States under color of law."[3]

2. The only question presented in the petition for certiorari is whether the words just quoted embrace Mrs. Holley's case. It is not suggested—nor could it be (see *King* v. *Smith,* 392 U.S. 309, 333, n. 34; *Burns* v. *Alcala,* 420 U.S. 575, 580)—that the federal regulation does not override any conflicting state rule. And it is common ground that the formula for alien eligibility under the AFDC program is identical to that chosen by Congress for comparable programs, the Supplemental Security Income for the Aged, Blind and Disabled (SSI), also administered by HEW,[4] and the federal-state unemployment compensation program partially paid for by the

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[3]The full text of the regulation, 45 C.F.R. 233.50, is as follows:

> Conditions for plan approval. A State plan under title I, IV-A, X, XIV, or XVI of the Social Security Act shall include an otherwise eligible individual who is resident of the United States but only if he is either (a) a citizen or (b) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) or section 212(d)(5) of the Immigration and Nationality Act).

[4]42 U.S.C. (Supp. V) 1382c(a)(1)(B).

Department of Labor.[5] The same test is incorporated in regulations for HEW's Medicaid program,[6] and was in the Agriculture Department's Food Stamp program[7] until the recent enactment of restrictive provisions.[8] As petitioner rightly suggests, the same words presumptively carry the same meaning in these several statutes and regulations.

The three federal Departments concerned with the identical test for alien eligibility are agreed that Mrs. Holley is an alien permanently residing in the United States under color of law. This consistent interpretation of a provision by those charged with the administration of the several programs is not without significance. See *Udall* v. *Tallman*, 380 U.S. 1, 16; *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381. But in any event, the decision of the court of appeals is, we submit, plainly correct.

3. There is little occasion to add to the analysis undertaken by the court of appeals. In our view, it is perfectly clear that the phrase "residing * * * *under color of law*" includes, at least, residence continued by virtue of official permission or acquiescence. And, here, there is no question about the Immigration Service's express decision to allow Mrs. Holley to remain in the country. The only possible argument is that she is not residing in the United States "*permanently*."

We believe the court of appeals correctly resolved that question (Pet. App. A14-A15) by noting that the regulation gives illustrative examples of an alien who, although not "admitted for permanent residence," is

[5]Pub. L. 94-566, Section 314(a), 90 Stat. 2680, to be codified at 26 U.S.C. 3304(a)(14)(A).

[6]45 C.F.R. 248.50.

[7]7 C.F.R. 271.1(e).

[8]See Pub. L. 95-113, Section 6(f), 91 Stat. 966, to be codified at 7 U.S.C. 2015(f).

"otherwise * * * *permanently* residing in the United States under color of law." These "permanent" residents include the beneficiaries of the "conditional entry" provision for refugees[9]—which may be revoked at any time[10]—and the beneficiaries of the "parole" provision, even though "parole," by definition, only permits presence within the country "temporarily."[11] The two examples—and they are no more than that—obviously forbid any narrow reading of "permanently."

What is more, these illustrative examples of conditional entry and parole—like the formula itself—are directly borrowed from the *congressional* language fixing the eligibility of aliens under the related SSI program[12] and have since been confirmed by the Congress in amendments to the federal-state unemployment compensation law.[13]

When we come to apply to the present case the test of "permanence," as illumined by the examples, the result is not in doubt. Although the decision to allow Mrs. Holley to remain in the country is not irrevocable, it would seem less temporary than in the case of a parolee. In all probability, the youngest of her children will remain dependent upon her for well over a decade. Moreover, it may be that when that dependency ceases, or before, Mrs. Holley will no longer be receiving public assistance and will become eligible for permanent residence status.

[9]8 U.S.C. 1153(a)(7).

[10]See 8 C.F.R. 235.9(f).

[11]8 U.S.C. 1182(d)(5). And see 8 C.F.R. 212.5.

[12]42 U.S.C. (Supp. V) 1382c(a)(1)(B).

[13]26 U.S.C. 3304(a)(14)(A), as amended in 1977.

4. In the circumstances, we believe the decision below does not warrant review by this Court. There is, admittedly, no conflicting ruling. Nor does the decision affect a broad category of aliens. We are advised by the Immigration Service that administrative discretion not to deport is very sparingly exercised. And the number of programs governed by the alien eligibility rule involved here is diminishing. As we have already noted, Congress has recently narrowed the category of aliens eligible under the Food Stamp program.[14] Moreover, proposals by the President to amend Section 249 of the Immigration and Nationality Act, as amended, 8 U.S.C. 1259,[15] will, if enacted, make the present eligibility formula obsolete. The continuing importance of the issue is accordingly doubtful.

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MARCH 1978.

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[14]See note 8, *supra*.

[15]See Senate Bill 2252, 123 Cong. Rec. S18064 (daily ed. October 28, 1977).